

Proposition 25:
Replace Cash Bail with Risk Assessment
Referendum

Referendum

By

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I. EXECUTIVE SUMMARY

In 2018, the California Legislature enacted Senate Bill (“SB”) 10 with the purpose of reforming California’s system for bail and release from jail. The referendum is the power of the people to approve or reject statutes the Legislature adopts.¹ Proposition 25 is a referendum that gives California voters the opportunity to determine the fate of SB 10, essentially giving voters the choice of whether California should keep the current money bail system, or to implement the new risk assessment system that SB 10 created.

A **YES** vote eliminates cash bail in favor of pretrial risk assessment. This risk assessment would determine if an arrestee will be released or detained until their trial. No one will pay any fees for their release.

A **NO** vote retains the cash bail system that was in place prior to 2018 and SB 10. Some people could be released without paying bail, while others would be required to pay bail. Fees could still be collected for a person’s release. SB 10 would not take effect.

II. BACKGROUND

A. Risk Assessment v. Cash Bail

Many states have begun using risk assessments as a supplement to the system of cash bail including Kentucky, Arizona, New Jersey, and Utah.² Risk assessments usually take the form of a Public Safety Assessment (“PSA”). These risk assessments consist of an algorithm that judges can use to make a determination about whether a person should be released or should be held in pretrial detention.³ These PSAs produce two risk scores. One attempts to determine the probability that an arrestee will commit another crime if released.⁴ The other attempts to determine the probability the arrestee will fail to appear at court.⁵ These PSAs consider various factors including: age, type of offense, criminal history, previous sentencing, and previous appearances.⁶

On the other hand, a cash bail system requires an arrestee pay some money as collateral, guaranteeing they will appear in court.⁷ If the arrestee fails to appear in court, the government keeps the money; if they make their appearances, the money is returned.⁸

¹ CAL. CONST. art. II, § 9.

² ARNOLD VENTURES, PUBLIC SAFETY ASSESSMENT FAQs (“PSA 101”) 5 *available at* https://craftmediabucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf (last visited Sept. 22, 2020).

³ *Id.* at 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 2.

⁷ Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CENTER FOR JUST. (Dec. 10, 2019), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

⁸ *Id.*

In most states and counties judges have broad discretion in setting the bail amount.⁹ In certain cases, the judge may choose not to fix a bail amount and instead release the offender on their “own recognizance.” Own recognizance is essentially an arrestee’s promise to return to court.¹⁰ However, when a person is unable to pay the bail, they have two options: remain in jail or contact a bail bondsman.¹¹ The former option is the reason approximately 70 percent of the US jail population consists of pretrial detainees.¹² Many people think the cash bail system discriminates against the poor and minorities.¹³ This perspective stems from studies that show that people who are incarcerated come from the poorest economic class, and that police in California arrest minorities at much higher rates than white arrestees.¹⁴ Further, over 63 percent of incarcerated persons in California are in jail because they cannot afford their bail amount.¹⁵

Bail Bonds companies usually provide a bond to secure a person’s release from prison in return for a percentage of the bail amount.¹⁶ However, when an arrestee uses a bondsman, their money is not returned to them when they show up in court or if their case is dismissed, as it typically would be if they had paid the government themselves.¹⁷ Instead, the bail bondsman keeps the percentage paid by the arrestee, in addition to various fee charges found in the terms and conditions of the bondsman’s contract.¹⁸ In exchange for a portion of the fee the bail bondsman charges, an insurance company underwrites the bail bondsman.¹⁹ However, the bail bondsman is always responsible for any losses the insurer may incur, so they pass these fees and payment plans onto the arrestees.²⁰ Consequently, the bail bonds industry profits substantially from arrestees who cannot afford their bail.²¹

III. THE LAW

A. Current Law in California

The bail system in California is similar to systems used in other states. When a person is arrested, the county officials that operate the jail can choose to hold the

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUM. RTS. WATCH (2017), at 2, 5, 16 <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly#>.

¹⁵ *Id.* at 17

¹⁶ Kayla James, *How the Bail Bond Industry Became a \$2 Billion Business*, GLOBAL CITIZEN (Jan. 31, 2019), <https://www.globalcitizen.org/en/content/bail-bond-industry-2-billion-poverty/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

individual until their arraignment or release them.²² A person may be released on their own recognizance or on bail, making a financial guarantee that they will return to appear in court.²³ An arraignment is the arrestee's first appearance in court, where the judge reads the person the charges against them and appoints them an attorney if they have not elected to retain an attorney themselves.²⁴ Some arrestees are held in jail prior to arraignment; however, with the exception of certain violent felony charges, the California Constitution guarantees a right to release prior to trial under conditions that are not excessive.²⁵ The bail amount is set according to a "schedule" by a judge or a magistrate.²⁶ The judge will set a fixed amount of bail for the arrestee to pay and will consider the safety of the public, the seriousness of the offense charged, the arrestee's previous criminal record, and the probability that they will appear in court.²⁷ This gives the judge a considerable degree of discretion in setting the terms and conditions of the person's bail and the judge may set an amount that they deem sufficient to ensure the safety of the public or victim, or to ensure that the person will appear in court.²⁸

As previously mentioned, there are two ways a person can pay their bail: they can either pay it on their own or with the help of a bail agent.²⁹ If the person pays their own bail, it is generally returned to them when they appear in court.³⁰ If they use a bail agent, they usually are required to pay a percentage of the bail to the agent, and the agent makes the financial guarantee to the court to pay the full bail amount if the arrestee does not make their appearances.³¹ The typical cost of using a bail bonds agent is 10 percent of the bail amount set by the court.³² If the arrestee misses their court date and the bail agent pays the bail amount, the bail agent can seek repayment from the arrestee.³³ If an arrestee is unable to pay their bail amount on their own and is unable to pay a 10 percent fee to a bail agent, they stay in jail awaiting their court date.³⁴

²² LEGIS. ANALYST'S OFF., PROPOSITION 25 1 (Nov. 3, 2020), available at <https://lao.ca.gov/ballot/2020/Prop25-110320.pdf>.

²³ CAL. CONST. art. 1, § 28(f)(3).

²⁴ LEGIS. ANALYST'S OFF., *supra* note 22, at 1.

²⁵ CAL. CONST. art. 1, § 12.

²⁶ LEGIS. ANALYST'S OFF., *supra* note 22, at 2.

²⁷ CAL. CONST. art. 1, § 12.

²⁸ CAL. CONST. art. 1, § 28(f)(3); CAL. PENAL CODE § 1270 (2020).

²⁹ LEGIS. ANALYST'S OFF., *supra* note 22, at 2.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

B. Proposed Law

1. Overview

SB 10 was proposed by Senator Robert Hertzberg during the 2017-2018 legislative session.³⁵ The purpose of the bill is to eliminate release on bail, create a new process for release before arraignment, and change the existing process for release at or after the arraignment hearing.³⁶ Essentially, SB 10 aimed to eliminate money bail in favor of a risk assessment system for release pending trial.³⁷

SB 10 creates a new system in which each court would be required to create a "entity, division, or program," called the Pretrial Assessment Services, that is tasked with assessing the risk level of arrestees, reporting their results, and making recommendations to the court for the conditions of the arrestee's release. The court may assign its own employees to Pretrial Assessment Services or it could contract with a public entity, an adjoining county, or a regional group to perform the assessment, reporting, and recommendation tasks. The members of Pretrial Assessment Services would all be considered officers of the court and would not partake in any supervision services (like probation or parole).³⁸

2. Pre-arraignment Release

Under SB 10, any person arrested for most misdemeanor crimes will be booked and released without being taken to jail, or, if they are taken into custody, they will be released within 12 hours of booking with no risk assessment.³⁹ For all other crimes, Pretrial Assessment Services will determine the arrestees risk of failing to appear in court and risk posed to public safety if released using a "validated risk assessment tool."⁴⁰ The "tool" must be one selected and approved by the court and Pretrial Assessment Services, and taken from a list provided and maintained by the Judicial Council.⁴¹ Each assessment will include a numeric "score" or a levels system to indicate whether the person is a "low," "medium," or "high" risk of failing to appear in court and pose a threat to public safety.⁴² Pretrial Assessment Services may also include recommendations that conditions be placed on a person's release to assure public safety and the person's return to court, but for low and medium risk persons, the conditions must be non-monetary.⁴³

³⁵ SB 10, 2016 Leg., 2017-2018 Reg. Sess. (Cal. 2016).

³⁶ *Id.*

³⁷ *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_\(2020\)](https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)) (last visited Sept. 22, 2020).

³⁸ CAL. PENAL CODE § 1320.7(g) (2020).

³⁹ CAL. PENAL CODE § 1320.8 (2020).

⁴⁰ CAL. PENAL CODE § 1320.9 (2020).

⁴¹ CAL. PENAL CODE § 1320.7(k) (2020).

⁴² CAL. PENAL CODE § 1320.9 (2020).

⁴³ CAL. PENAL CODE § 1320.10(d) (2020).

Those arrested and detained that Pretrial Assessment Services finds to be “low risk” will be released on their own recognizance with the least restrictive non-monetary conditions.⁴⁴ Those “medium risk” arrestees may either be released or detained. If released, the same conditions for their release applies as does for “low risk” persons.⁴⁵ Any person released on their own recognizance must sign a release agreement that promises, among other things, that the person will appear in court, will not leave the state, and knows about the consequences if they violate the conditions of their release.⁴⁶ Any “high risk” arrestee or any person who was arrested for a violent or serious felony offense will not be released.⁴⁷

3. Release at Arraignment

Courts will adopt rules for “medium risk” persons that the police hold until arraignment, the first hearing in court in which the judge reads the charges.⁴⁸ These court rules will allow “medium risk” arrestees to be released on own recognizance or supervised own recognizance.⁴⁹ The rules will also be evaluated annually by the court to consider the impacts on public safety and the defendants’ due process rights.⁵⁰ A pre-arraignment review may be done for those “medium risk” persons who were not eligible for immediate release.⁵¹ A court may either approve or decline release based on the pre-arraignment review, depending on if the court finds that conditions on release will ensure safety to the public and the person’s appearance in court.⁵²

Pretrial Assessment Services will submit to the court, for consideration at the person’s arraignment, information regarding the risk assessment score or level of the arrestee, the criminal charges against the arrestee, additional information relating to the arrestee’s risk to the public or risk of failure to appear in court, and their recommendation for conditions of release.⁵³ The court may choose to release the person at arraignment and must apply the least restrictive non-monetary conditions to ensure the person will appear in court.⁵⁴ The prosecution may request that the person remain detained until trial if they are charged with certain violent crimes.⁵⁵ The court may find that there is no sufficient basis for detaining a defendant until trial and may order their release, however, those found to be “high risk” or those charged with violent or serious felonies must overcome a presumption that no

⁴⁴ CAL. PENAL CODE § 1320.10(b) (2020).

⁴⁵ CAL. PENAL CODE § 1320.10(c) (2020).

⁴⁶ CAL. PENAL CODE § 1320.10(g) (2020).

⁴⁷ CAL. PENAL CODE § 1320.10(e) (2020).

⁴⁸ CAL. PENAL CODE § 1320.11 (2020).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ CAL. PENAL CODE § 1320.13 (2020).

⁵² CAL. PENAL CODE § 1320.13(e), (h) (2020).

⁵³ CAL. PENAL CODE § 1320.15 (2020).

⁵⁴ CAL. PENAL CODE § 1320.17 (2020).

⁵⁵ CAL. PENAL CODE § 1320.18 (2020).

condition on release will ensure safety to the public or that they will return to court.⁵⁶ Most criminal charges that will be considered “high risk” and will be subject to a presumption against release include crimes of violence against another person, serious or violent felonies, or persons arrested while on conditional or supervised release or post-conviction.⁵⁷

C. Path to the Ballot

In August 2018, California became the first state to eliminate the cash bail system when the Legislature enacted and then Governor Jerry Brown signed SB 10 into law.⁵⁸ Immediately after Governor Brown signed SB 10, the bail bonds industry began collecting signatures to reject SB 10 through a voter referendum.⁵⁹ In order to qualify the referendum for the ballot, the proponents needed to collect signatures amounting to 5 percent of the votes cast in the last gubernatorial election.⁶⁰ After filing the referendum, the proponents had 90 days to collect 365,880 signatures before November 26, 2018.⁶¹ Six days before the deadline, the proponents submitted 576,822 signatures.⁶² After a random sample count, over 80 percent were found to be valid, approximately 409,505 signatures, exceeding the number needed to qualify.⁶³

In January 2019, the “Referendum to Overturn a 2018 Law That Replaced Money Bail System with a System Based on Public Safety Risk” qualified for the November 2020 ballot.⁶⁴ This referendum became Proposition 25. If voters approve Proposition 25, SB 10 becomes law, eliminating cash bail in California. If voters reject the referendum, SB 10 fails, maintaining the status quo of cash bail.

D. Referendum Changes and Purpose

Proposition 25 is a referendum that gives the people the opportunity to vote on whether to enact SB 10, which proposes to eliminate cash bail. Since Proposition 25 is a referendum, voters who support SB 10 and the elimination of cash bail should vote **YES** on the initiative, while voters who would like to retain cash bail should vote **NO**.

⁵⁶ CAL. PENAL CODE § 1320.20 (2020).

⁵⁷ CAL. PENAL CODE § 1320.10(e) (2020).

⁵⁸ Vanessa Romo, *California Becomes First State To End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail>.

⁵⁹ Reid Wilson, *Bail Bond Industry Mobilizes Against Calif. Law Eliminating Cash Bail*, HILL (Aug. 30, 2018), <https://thehill.com/homenews/campaign/404395-bail-bond-industry-mobilizes-against-calif-law-eliminating-cash-bail>.

⁶⁰ CAL. CONST. art. II, § 9.

⁶¹ BALLOTEDIA, *supra* note 37.

⁶² *Id.*

⁶³ CAL. SEC’Y OF STATE, FINAL RANDOM SAMPLE (2019), available at <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/1856-finalrandomsample-1-16-19.pdf>.

⁶⁴ *Id.*

A **YES** vote eliminates cash bail in favor of pretrial risk assessment. This risk assessment would determine if an arrestee would be released or detained until their trial. No one will pay any fees for their release.

A **NO** vote retains the cash bail system. Some people could be released without paying bail, while others would be required to pay bail. Fees could still be collected for a person's release. SB 10 would not take effect.

E. Related Legislation

In 2016, Assembly Member Rob Bonta proposed Assembly Bill ("AB") 42.⁶⁵ AB 42 was substantially similar to SB 10. It also proposed eliminating cash bail in favor of a pretrial risk assessment to determine whether a person arrested would be detained.⁶⁶ However, AB 42 was voted down on the Assembly floor.⁶⁷

In 2017, Assembly Member Blanca Rubio proposed AB 789. AB 789 amended the law pertaining to release on own recognizance.⁶⁸ This proposal passed the Legislature and was signed into law by then Governor Jerry Brown.⁶⁹ This law expanded the criteria under which a person can be prohibited from being released on own recognizance without a court hearing.⁷⁰ Consequently, the expanded criteria granted judges greater discretion in refusing to release arrestees on their own recognizance in certain circumstances.⁷¹ This greater discretion made it more difficult for the alleged offenders to obtain release on own recognizance, especially if they had a history of failing to appear in court.⁷²

⁶⁵ Assembly Member Bonta was also a lead coauthor of SB 10.

⁶⁶ AB 42, 2016 Leg., 2017–2018 Reg. Sess. (Cal. 2016) (as amended May 30, 2017, but not enacted).

⁶⁷ Complete Bill History of AB 42, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB42 (last visited Sep. 21, 2020).

⁶⁸ AB 789, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017).

⁶⁹ Complete Bill History of AB 789, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB789 (last visited Oct. 3, 2020).

⁷⁰ CAL. PENAL CODE § 1319.5 (2020).

⁷¹ See CAL. PENAL CODE § 1319.5 (2020) (requiring court hearing before a magistrate prior to release on own recognizance).

⁷² See CAL. PENAL CODE § 1319.5 (2020) (prohibiting release on own recognizance in the event an alleged offender fails to appear in court three times within three years).

F. Other States

1. Alaska

In the summer of 2016, Alaska enacted SB 91. SB 91 completely overhauled Alaska's criminal justice system, including changes in bail, parole, and probation.⁷³ According to a 2018 report, since 2016, the prison population declined 4.8 percent while the prison admission rate increased by 11 percent from October 2017 to July 2018.⁷⁴ This increase in prison admission was attributed to an increase in crime.⁷⁵ Even though some supporters claimed that insufficient time passed to judge the merits of the bill, one of its sponsors became convinced that it was a mistake.⁷⁶ Senator Mia Costello likened SB 91 to giving a "green light" to criminals, allowing them to feel "emboldened by this law."⁷⁷

In 2018, in response to this perceived spike in crime, Republican Michael Dunleavy campaigned on the platform "Make Alaska Safe Again."⁷⁸ After his election, Governor Dunleavy proposed and signed House Bill 49 ("HB 49"), which repealed and replaced SB 91.⁷⁹ HB 49 reclassified many of the drug and sexual offenses that SB 91 attempted to reclassify.⁸⁰ The law also increased sentencing for felonies and misdemeanors while keeping the maximum sentencing lengths.⁸¹ Discretion for parole and pretrial determination was returned to the parole board and judge, the presumption of release was eliminated, and the Pretrial Services Program was retained.⁸² Additionally, manufacture and distribution of methamphetamines was re-criminalized.⁸³

⁷³ Devin Kelly, *Alaska's criminal justice reform is achieving its goals, annual report says*, ANCHORAGE DAILY NEWS (Nov. 2, 2018), <https://www.adn.com/alaska-news/crime-courts/2018/11/02/alaskas-criminal-justice-reform-is-achieving-its-goals-annual-report-says/>.

⁷⁴ ALASKA CRIMINAL JUSTICE COMM'N: 2018 ANNUAL REPORT 16 (Nov. 1, 2018), *available at* <https://s3.amazonaws.com/arc-wordpress-client-uploads/adn/wp-content/uploads/2018/11/02093414/ACJC-Annual-Report-2018.pdf>.

⁷⁵ Kelly, *supra* note 73.

⁷⁶ Alan Greenblatt, *After Reforming Criminal Justice, Alaska Has Second Thoughts*, GOVERNING (Feb. 2018), <https://www.governing.com/topics/public-justice-safety/gov-alaska-criminal-justice-increasing-crime-rates.html>.

⁷⁷ *Id.*

⁷⁸ Zachary A. Siegel, *Alaska Passed Sweeping Criminal Justice Reforms. Its New Governor Just Unraveled Them.*, APPEAL (July 11, 2019), <https://theappeal.org/alaska-passed-sweeping-criminal-justice-reforms-its-new-governor-just-unraveled-them/>.

⁷⁹ *Governor Dunleavy Signs Crime-Fighting Legislation Into Law*, OFF. GOVERNOR MIKE DUNLEAVY (July 8, 2019), <https://gov.alaska.gov/newsroom/2019/07/08/governor-dunleavy-signs-crime-fighting-legislation-into-law/>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

2. New York

In April 2019, New York enacted criminal reform legislation eliminating cash bail and pretrial detention for almost all misdemeanors and nonviolent felonies.⁸⁴ However, it was immediately opposed by law enforcement officials for being too lax on crime and threatening public safety.⁸⁵ After the Coronavirus pandemic caused a budget shortfall in 2020, the Legislature enacted a budget that included modifications to the criminal justice reform enacted in 2019.⁸⁶ These modifications expanded the list of crimes in which judges could employ bail and included persistent offenders in that list.⁸⁷

3. New Jersey

In 2014, New Jersey passed Senate Bill 946 (“S946”). This law all but eliminated cash bail.⁸⁸ In place of bail, this law allows judges to determine whether to detain an offender or release them based on an assessment of the risk they pose to the community.⁸⁹ However, judges in New Jersey are empowered to detain offenders for up to 180 days after their indictment, unlike in New York.⁹⁰ Further, judges may grant prosecutorial motions for revocation of release to offenders.⁹¹

In 2018, the New Jersey Judiciary published a report assessing the results of this new law. The rate of new offenses committed by people awaiting trial increased from 12.7 percent in 2014 to 13.7 percent in 2017.⁹² Court appearances decreased from 92.7 percent in 2014 to 89.4 percent in 2017.⁹³ The average time defendants spent in pretrial detention decreased from 62.4 days in 2014 to 37.2 days in 2017.⁹⁴ The report also showed that black arrestees experienced an average reduction of 10.3 days in pretrial detention, and white arrestees 5.2 days.⁹⁵

⁸⁴ MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR COURT INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 1 (2019), *available at* https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf.

⁸⁵ Luis Ferré-Sadurní & Jesse McKinley, *We Can't Spend What We Don't Have: Virus Strikes N.Y. Budget*, N.Y. TIMES (April 2, 2020), <https://www.nytimes.com/2020/04/02/nyregion/coronavirus-ny-state-budget.html>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Rafael A. Mangual, *How New Jersey Did Bail Reform Better Than New York*, MANHATTAN INST. (Jan. 12, 2020), <https://www.manhattan-institute.org/how-new-jersey-did-bail-reform-better-than-new-york>.

⁸⁹ Joe Hernandez, *N.J. Officials Finally Release Data on Bail Reform. Their Conclusion? It's Working*, WHY (April 2, 2019), <https://why.org/articles/n-j-officials-have-finally-released-data-on-bail-reform-their-conclusion-its-working/>.

⁹⁰ Mangual, *supra* note 88.

⁹¹ *Id.*

⁹² N.J. JUDICIARY, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 13 (2018), *available at* <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=Zp5>.

⁹³ *Id.* at 14.

⁹⁴ *Id.* at 21.

⁹⁵ *Id.* at 22. Time spent in jail pretrial decreased from 42.3 to 32.0 days for black defendants and from 22.7 to 17.5 days for white defendants.

The jail population declined by 5,600 for men and 600 for women from 2012 to 2018.⁹⁶ This decline included approximately 3,000 black individuals, 1,500 white individuals, and 1,300 Hispanic individuals.⁹⁷ However, the proportion of Black prisoners remained constant at 54 percent of the overall population, while the proportion of white prisoners increased slightly from 28 to 30 percent, and the Hispanic population slightly decreased from 18 to 16 percent.⁹⁸ The racial distribution remained constant among men, while the proportion of black women decreased from 44 to 34 percent, and the distribution of white women increased from 44 to 54 percent.⁹⁹

Fiscally, the criminal justice reform did not fare well. In 2018, expenses exceeded revenue.¹⁰⁰ The program cost approximately \$35 million, while the new court fees net approximately \$22 million.¹⁰¹ According to John Donnadio, the Executive Director of the New Jersey Association of Counties, “the state's 21 counties are also dealing with added costs because prosecutors' offices have had to hire additional staff.”¹⁰² Some proponents claim that a diminished prison population will lead to a reduction in prison costs.¹⁰³ However, the reduction in jail population “hasn't translated to cost savings as of yet. It may, two or three years down the road as jail staff shrink through attrition.”¹⁰⁴

II. DRAFTING ISSUES

Proposition 25 is a referendum. This means that its aim is to overturn a law passed and approved by the Legislature – SB 10. Right now, SB 10 is on hold, so there is currently no effect on existing law. Passing the measure allows the proposed law to go into effect, making changes to various sections of the Government and Penal Codes.¹⁰⁵

⁹⁶ *Id.* at 26.

⁹⁷ *Id.* at 27.

⁹⁸ *Id.* at 27.

⁹⁹ *Id.* at 28.

¹⁰⁰ *Id.* at 39.

¹⁰¹ Maddie Hanna, *What Happened When New Jersey Stopped Relying on Cash Bail*, PHILA. INQUIRER (Feb. 16, 2018), https://www.inquirer.com/philly/news/new_jersey/new-jersey-cash-bail-risk-assessment-20180216.html.

¹⁰² *Id.*

¹⁰³ Katherine Landergan, *Report: Bail Reform Has Lowered Jail Population, but Program Facing 'Funding Crisis'*, POLITICO (April 2, 2019), <https://www.politico.com/states/new-jersey/story/2019/04/02/report-bail-reform-has-lowered-jail-population-but-program-facing-funding-crisis-945756>.

¹⁰⁴ Hanna, *supra* note 101.

¹⁰⁵ SB 10, 2016 Leg., 2017–2018 Reg. Sess. (Cal. 2016) (amending Cal. Gov. Code § 27771; adding Cal. Penal Code §§ 1320.6–1320.34; repealing Cal. Penal Code §§ 1268–1320.5).

III. CONSTITUTIONAL ISSUES

A. Federal Constitution

The Eighth Amendment prohibits excessive bail.¹⁰⁶ In 1951, the Supreme Court clarified that “[the bail] clause has never been thought to accord a right to bail in all cases, but merely to provide that bail should not be excessive in those cases where it is proper to grant bail.”¹⁰⁷ Further, in a separate case around the same time, the Court also declared that since bail is used as a means of ensuring a defendant will appear in court, any amount of bail set higher than reasonably necessary to fulfill that purpose is ‘excessive.’¹⁰⁸ In 1987, the Court made another pronouncement regarding pretrial detention and the Eighth Amendment, holding that “nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.”¹⁰⁹

Since SB 10 only modifies the type of bail courts will use, by eliminating money bail in favor of release on recognizance, it should not cause an Eighth Amendment issue. A question of excessiveness in bail amount should not arise because SB 10 would eliminate money bail. The question of pretrial detention, which SB 10 would still allow, has been approved by the Supreme Court.¹¹⁰

B. State Constitution

The California Constitution guarantees a right to release prior to trial under conditions that are not excessive, but stipulates certain violent and serious felonies to which that rule does not apply.¹¹¹ The language in SB 10 is consistent with the limitations in the California Constitution regarding which offenses are exempt from the opportunity for non-excessive release.¹¹²

IV. PUBLIC POLICY ISSUES

A. Opponents

The opponents of the proposition, seeking a **YES** vote, provide three primary arguments in favor of ending cash bail and replacing it with a risk assessment system:

¹⁰⁶ U.S. CONST. amend. VIII.

¹⁰⁷ *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952).

¹⁰⁸ *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

¹⁰⁹ *U.S. v. Salerno*, 481 U.S. 739, 743, 754 (1987).

¹¹⁰ *Id.* at 754.

¹¹¹ CAL. CONST. art. I, § 12.

¹¹² SB 10, 2016 Leg., 2017–2018 Reg. Sess. (Cal. 2016) (adding Cal. Penal Code §§ 1320.10 (e), 1320.13(b), 1320.20).

money bail is unfair and unjust; allowing money bail creates a public safety concern; and money bail is more expensive for taxpayers.

Opponents argue that the cash bail system treats people differently based on their ability to pay and often is grossly disadvantageous those experiencing poverty. Because people with wealth have the ability to pay bail costs or bonds, they essentially can pay for their release and are given an advantage and opportunity that the poor are not.¹¹³ Opponents contend that poor people are punished by having to remain in jail for extended periods of time awaiting their trial or arraignment dates because they are unable to pay for their freedom, making the application of the system unjust and unfair to those without the appropriate means.¹¹⁴ Further, because poverty often disproportionately affects people of color, opponents assert that the system is discriminatory in its effect.¹¹⁵ Opponents also claim that Prop 25 is predominantly supported by the predatory bail bonds industry that profits off of the poor and does not really have the best interest of the people in mind.¹¹⁶

Under the new bail system, opponents argue, the safety of the public will be the primary concern.¹¹⁷ Judges' determinations regarding whether to release people will be based on whether they are likely to commit another crime or flee from their court dates, and will not focus on how much money someone has. The risk assessment system, according to the opponents, will make the safety of the public the guiding principle.¹¹⁸

Some opponents to Prop 25 also contend that the risk assessment system will result in cost saving to taxpayers. They argue that there are many thousands of people awaiting trial in jail and California taxpayers front the bill for detaining them.¹¹⁹ The new system would presumably reduce the number of pretrial detainees and lessen the jail population, saving taxpayers "millions every day."¹²⁰

B. Proponents

Proponents, seeking a **NO** vote on Prop 25, make many arguments against replacing the cash bail system with the risk assessment system proposed by SB 10. Some of their arguments include that: (1) the risk assessment system uses unreliable computers systems that will eliminate the right to bail and increase bias against minorities; (2) the use of the risk assessment system will result in an increased risk to public safety; and (3) the SB 10 system will have a significant negative impact on taxpayers and the bail industry.

¹¹³ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 3, 2020, at 76, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf> ["NOVEMBER 2020 VOTER GUIDE"].

¹¹⁴ *Id.*

¹¹⁵ Onyekwere, *supra* note 7.

¹¹⁶ James, *supra* note 16.

¹¹⁷ NOVEMBER 2020 VOTER GUIDE at 76.

¹¹⁸ *Id.*

¹¹⁹ *Why we need Reform, YES ON 25*, https://yesoncaprop25.com/why_bail_reform (last visited Sept. 22, 2020).

¹²⁰ *Id.*

Proponents argue that the risk assessment system would use computer algorithms that are unreliable and do not provide the level of fair judgment that a judge would have.¹²¹ The use of these kinds of computer systems could result in more burden on the court by requiring them to reevaluate and sometimes “overrule the computer’s decision.”¹²² Moreover, proponents argue, the current bail system gives people the choice to secure their release by paying for it and the risk assessment system would deny them of that choice. Some civil rights groups argue that these computer algorithms would use profiling methods that would create more biased outcomes against people of color and the poor than already exists under the cash bail system.¹²³

Proponents also contend that the risk assessment release system would result in increased risk to public safety by allowing for the release of criminals immediately following their arrest.¹²⁴ The current system, according to proponents, ensures that people accused of crimes will make their court appearances and be held accountable for their actions. Some proponents believe this risk assessment system could also result in an increased burden on law enforcement agencies.¹²⁵

Contrary to opponents’ arguments, proponents claim that the risk assessment release system would increase the cost to taxpayers. Local and state court costs would increase, according to proponents, from implementing the new system, which will impact the cost to taxpayers.¹²⁶ The State Judiciary would bear the cost of contracting out for Pretrial Assessment Service employees and counties would be reimbursed for any outstanding expenses.¹²⁷ However, some organizations have voiced concerns over the State’s reliability in following through on fiscal promises.¹²⁸ Proponents argue that state and county budgets are facing historically deficient budgets resulting from the coronavirus pandemic, and this bill would only increase those deficits, causing taxpayers to suffer.¹²⁹ Furthermore, proponents contend that the bail bonds industry faces elimination and all bail

¹²¹ *Get the Facts*, NO ON PROP 25, <https://stopprop25.com/get-the-facts/> (last visited Sept. 22, 2020).

¹²² NOVEMBER 2020 VOTER GUIDE at 77.

¹²³ Nadia Lopez, *California’s Cash Bail System Favors the Rich. Would Replacing it Help People of Color?*, FRESNO BEE (Sept. 16, 2020), available at <https://www.fresnobee.com/news/politics-government/election/article245051135.html>.

¹²⁴ *Id.*

¹²⁵ NO ON PROP 25, *supra* note 121.

¹²⁶ *Id.*

¹²⁷ CAL. PENAL CODE §§ 1320.26–1320.29 (2020).

¹²⁸ RURAL CNTY. REPRESENTATIVES OF CAL. (“RCRC”), MEMO ON SENATE BILL 10 – BAIL REFORM REFERENDUM (2020), available at https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/616158/Senate_Bill_10_-_Bail_Reform_Referendum_MEMO_-_PS.pdf.

¹²⁹ NOVEMBER 2020 VOTER GUIDE at 77.

bonds agents, including small business owners, and their employees will face unemployment if this measure passes.¹³⁰

C. Fiscal Impact

According to the Legislative Analyst's Office ("LAO"), the size of the effects to state and local budgets is uncertain and would depend on the interpretation and implementation of the statute and other various factors. However, it is estimated that there would be increased state and local pretrial release costs, decreased county jail costs, and impacts on state and local tax revenues.

The increase to the state and local governments would likely result from increased workload on pretrial risk assessment and pretrial detention hearings. These costs may be offset by a decrease in other areas, but ultimately, the LAO estimates increased costs in the mid hundreds of millions annually. However, the financial burden would be shifted from county budgets to the State's General Fund as the costs will primarily be borne by the State Judiciary.¹³¹ However, as evidenced by Proposition 98 and education funding, the Legislature often finds ways to shift revenue to limit financial obligations of the General Fund.¹³² Consequently, there may be little hope that the State will follow through on its financial obligations to the Judiciary and local governments, which may leave the county budgets to bear the brunt of the costs.¹³³

Cost effects on county jails will depend on the number of people released and detained under the new system. There could be a substantial decrease in jail populations because people who normally would not have been able to pay their bail may be increasingly released on own recognizance. On the other hand, the new system could also result in an increase in jail population because people who normally would pay for their release may be increasingly detained. The LAO estimates that the former is more likely and that this will probably result in a decrease of tens of millions of dollars for county jails.

The impact on state and local tax revenues is uncertain. In 2018, revenues from taxes on bail fees collected by insurance companies totaled \$13 million.¹³⁴ These revenues could decrease due to insurance companies no longer paying insurance taxes on bail bonds.¹³⁵ Or tax revenues could increase because the money people would normally spend on bail or bonds could be spent on taxable goods.

¹³⁰ *No on Prop 25*, AM. BAIL COALITION, <https://ambailcoalition.org/californians-for-safer-communities/> (last visited Sept. 22, 2020).

¹³¹ CAL. PENAL CODE §§ 1320.26–1320.29 (2020).

¹³² See LEGIS. ANALYST'S OFF., A HISTORICAL REVIEW OF PROPOSITION 98 18–20 (2017), *available at* <https://lao.ca.gov/reports/2017/3526/review-prop-98-011817.pdf> (detailing twenty-four instances in which the state shifted revenue resulting in increased state revenue and subsequent decrease in education guarantees).

¹³³ RCRC, *supra* note 128.

¹³⁴ Lopez, *supra* note 123.

¹³⁵ See Letter from Gabriel Petek, Legislative Analyst & Keely Martin Bosler, Director of Finance, to Hon. Xavier Becerra, Att'y Gen., Cal. Dept. of Just. at 2 (Sept. 4, 2019), *available at*

V. CONCLUSION

Proposition 25 determines whether California will implement SB 10. The aim of SB 10 is to implement a risk assessment system to replace the existing cash bail system. The risk assessment system would focus on the level of risk a person poses of not appearing in court and to public safety. If Pretrial Assessment Services determines that a person is a flight risk or subject to repeat offenses, the court may choose to keep them detained until their arraignment or trial dates. Proponents of the referendum believe the risk assessment system would create a less just and fair system that would potentially subject people of color to worse biases, create a greater risk to public safety, and cost taxpayers more money. Opponents of the proposition, in favor of SB 10, think that the cash bail system favors the wealthy and unfairly punishes the poor and communities of color, and the risk assessment system would put more focus on public safety and save taxpayers money. The financial effects on the state and local governments is uncertain at this time, with estimates on cost and savings being in the tens of millions.

<https://lao.ca.gov/ballot/2019/190493.pdf> (describing how the insurance companies paid approximately \$13 million in 2018, for insuring bonds).